No. 05-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 2005

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents

On Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, NEW YORK STATE SCHOOL BOARDS ASSOCIATION AND NEW YORK STATE COUNCIL OF SCHOOL SUPERINTENDENTS IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents over 95,000 of the nation's school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation. Recognizing that all children, including those with disabilities, have a right to be provided with a free appropriate public education, NSBA has consistently supported the rights of disabled children, while at the same time being fully cognizant of the financial and human resources that its members devote each and every year, above and beyond the partial funding provided by the federal government, for the education of students with disabilities pursuant to the federal Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400 *et seq.* (2005) ("IDEA"). The toll that an adversarial and litigious conception of IDEA exacts on school resources confronts NSBA members with more difficult choices

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[1] This brief is filed with the consent of both parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

among services to all children, including children with disabilities.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports the goals and purposes of the IDEA and therefore is concerned that special education funding be spent to ensure appropriate educational services for children with disabilities and not on legal costs.

The New York State School Boards Association, Inc., ("NYSSBA"), is a not-for-profit membership corporation incorporated under the laws of the State of New York. Its membership consists of approximately ninety-five percent (95%) of all public school districts in New York State. Pursuant to Section 1618 of New York's Education Law, NYSSBA has the responsibility of devising practical ways and means for obtaining greater economy and efficiency in the administration of public school district affairs and projects. Pursuant to this responsibility, NYSSBA often appears as *amicus curiae* before both federal and state court proceedings involving constitutional and statutory issues affecting the administration and operation of public schools, including the education of children with disabilities. NYSSBA believes that the educational needs and interests of children with disabilities must be served appropriately and without delay to help them achieve their place as

active and productive members of society. This can only be achieved if parents and school districts work collaboratively as equal partners who share information and concerns on an ongoing basis, adjusting as necessary, rather than through lengthy litigation where experts battle each other at public expense, and not always in the best interest of children.

The New York State Council of School Superintendents ("NYSCOSS") is a professional association whose membership comprises approximately 96% of all school superintendents in the State of New York. Under New York law, superintendents of schools are the chief executive officers of the state's school districts and are responsible for day to day enforcement and implementation of state and federal law, including the IDEA. As such, NYSCOSS's members play an integral role with their boards of education and the larger community to ensure that children with disabilities in their districts have available to them high quality and appropriate services designed to help these students meet high academic standards. Despite their efforts, school districts are confronted with the ever increasing cost of litigation in special education. Given the obligation of school districts to serve all children, the threat of assuming yet another fiscal liability in the implementation of this important federal law is of great concern. NYSCOSS is particularly concerned that a decision by this Court that concludes that the IDEA authorizes the award of expert fees will undoubtedly encourage litigation against school districts instead of

collaboration in the IEP process as Congress clearly envisioned.

SUMMARY OF ARGUMENT

The issue presented in this case—whether IDEA's attorneys' fees shifting provision authorizes an award of expert witness fees to a prevailing party—is an important one to every school district in New York and throughout the nation. Millions of children in this country are educated according to individualized education programs ("IEPs") created pursuant to the IDEA in what is intended to be a collaborative effort between parents or guardians and school district employees, with the goal of ensuring educational progress and achievement even for this country's most profoundly disabled children.

As Petitioner's brief persuasively argues, the Second Circuit's decision requiring school districts to pay for expert fees incurred by parents is not supported by law. Similarly, the policies underlying the IDEA argue against reading an authorization of expert fee awards into the statute. Fundamentally, the Second Circuit's decision runs contrary to IDEA's tenet that decisions involving the education of students with disabilities be made collaboratively between school district personnel and parents. Congress has repeatedly attempted to move IDEA beyond the adversarial paradigm with which its implementation has been plagued. The Second Circuit's decision subverts the mechanisms that Congress put into the law to promote this cooperative process while ensuring parents are afforded a meaningful opportunity to participate

fully in developing IEPs for their children. The collaborative process ensures that agreement on the educational placement and services for a child with disabilities is reached as expeditiously as possible and provides a means to make adjustments as necessary to meet the child's educational needs.

Authorizing expert fee awards to prevailing party parents instead would result in more litigation and extended hearings, causing increased expenses and delays for school districts and parents alike. Reimbursement of parents' experts will divert already limited resources from where the money belongs: funding educational services for all children. The decision of the Second Circuit in this case must be reversed.

ARGUMENT

I. Recovery of Expert Witness Fees is Contrary to IDEA's Collaborative Framework

The IDEA is a sweeping statute that has opened the doors of public schools to students with disabilities since its initial inception in 1975. Beginning with the process of identifying children with disabilities (commonly referred to as the "child find" process), initial evaluation and identification of students with disabilities, IDEA imposes extraordinarily complex procedural and substantive requirements upon states and local education agencies ("LEAs," usually school districts) that accept federal funding.

The crux of the IDEA is the provision of a free appropriate, public education ("FAPE") to all students with disabilities—a multi-faceted decision that is driven by the unique needs of each student. Deciding what FAPE means for each student is the responsibility of the student's IEP team, which makes decisions by consensus. The IEP team is composed of various school and health professionals involved in the child's education or assessment and always includes the parents. Each IEP is reviewed at least annually by the IEP team, or more often as reasonably requested by any team member. 20 U.S.C. §§ 1400(d)(1)(A) and 1414(d). The IDEA also requires that reevaluations be conducted for all students with disabilities at least once every three years, thus ensuring that the IEP team considers recent information. 34 C.F.R. § 300.321. A student's IEP ultimately is a "living and breathing" document that assesses a student's educational needs, identifies achievement goals and short-term objectives, specifies the special education and related services to be provided in furtherance of those goals, and determines the setting (from full inclusion to residential placement) in which those goals can appropriately be met. To ensure that parents can participate in a meaningful, informed and collaborative manner in decisions about their children's education, the IDEA affords the parents of children with disabilities numerous protections at each and every step, including strict timelines, parent notice and parent consent provisions.

A. The IDEA establishes a collaborative framework for parents and school districts to work together to ensure appropriate educational programs for children with disabilities

The Second Circuit in this case held that allowing the recovery of expert fees is "consistent with the purposes of IDEA. . . ." *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 358 (2d Cir. 2005). This view fundamentally misunderstands the effect that the recovery of expert witness fees will have on the relationship between the parties to IDEA cases. Instead of promoting a collaborative team approach, the potential availability of expert fees will by its very nature undermine the "cooperative process . . . between parents and schools" that this Court has recognized as the core of the IDEA. *Schaffer v. Weast*, ___ U.S. ___, 126 S.Ct. 528, 532 (2005); *Board of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 205 (1982) (noting that Congress emphasized the full participation of all parties in developing the IEP).

The IDEA contemplates a collaborative relationship between parents, teachers, and special education administrators at every step in the development of a student's IEP and the determination of his or her educational placement and services. 20 U.S.C. § 1414(d). The IDEA sustains this collaborative relationship by affording parents a whole host of rights of which school districts must inform parents in a readable form at

several designated points in the process. The purpose of these rights is to make sure parents are included in the process on an equal footing with other IEP team members and that they have the understanding and information necessary to participate in a meaningful way in determining the course of their child's education.

These rights include: (1) prior written notice a reasonable time before any proposed change is implemented in the child's educational program; (2) notices written in "language understandable to the general public" and in the primary language of the parents; (3) the right to give or withhold consent to evaluation, reevaluation, and placement of the child; (4) parent access to the records relevant to the case and the right to have the records explained, to make copies, and to amend records the parents consider inaccurate, misleading, or an invasion of privacy; (5) the right to be present at and actively participate in every IEP team meeting (in fact, a school district cannot hold an IEP team meeting without the parents unless it has been unable to convince the parents they need to attend and has documented its contacts with the parents by phone, mail and in person, and the results of those contacts); (6) the right to an independent educational evaluation at school district expense; (7) an opportunity for a fair and impartial hearing where parents have the right to be represented by a lawyer or an individual trained in the problems of children with disabilities; the right to present evidence and to subpoena, confront, and cross-examine witnesses; and the right to obtain a transcript of the hearing and a written

decision by the hearing officer; and (8) the right to judicial review and attorneys' fees if the parents prevail. 20 U.S.C. § 1415; 34 C.F.R. §§ 300.129, 300.345 (outlining the methods school districts must use to ensure parent participation in IEP meetings); 34 C.F.R. §§ 300.500-300.517 (providing detailed procedural protections for parents and children); 34 C.F.R. § 300.503(a)(prescribing the contents of the notice containing procedural safeguards); 34 C.F.R. § 300.509 (enumerating the extensive hearing rights parents have before an "impartial hearing officer"). Although the Act requires states to establish an impartial administrative hearing process for the resolution of parental complaints, guarantees certain minimum procedural safeguards, and provides for judicial review, its clear preference is for parents and schools to work together to ensure that children with disabilities are receiving the special education and related services they need. 20 U.S.C. § 1415(a)-(i). Courts have recognized over and over that this collaboration between parents and school districts is critical: "[p]articularly in this difficult area of education for a disabled child, it takes a firm resolve, by parents and educators alike, to work collaboratively, in pursuit of a child's education, even when that collaboration is challenging, choices are limited, and patience runs thin." *Wagner v. Board of Educ. of Montgomery County*, 340 F. Supp. 2d 603, 610 (D. Md. 2004).

B. IDEA's collaborative scheme provides parents early access to independent experts by allowing parent to request at the IEP development stage an independent educational evaluation at school district expense

The IDEA and its implementing regulations already protect parents who do not agree with the results of an evaluation performed by school district personnel or with a decision made by their child's IEP team. Specifically, the regulations implementing IDEA provide that parents may request at any point in the process that an independent educational evaluation ("IEE") be conducted for their child by an independent evaluator, a qualified professional examiner who is not employed or otherwise associated with the school district, at the school district's expense. 34 C.F.R. § 300.502(b); 20 U.S.C. § 1415(b)(1).

When a parent requests an IEE at school district expense, the school district must without undue delay either (1) agree and provide the parent with information about where an IEE may be obtained and the district criteria applicable to IEEs,[2]

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[2] These criteria must be the same as the criteria the district uses itself when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to obtain an IEE. A district may not impose any other conditions or timelines. 34 C.F.R. § 300.502(e)(1), (2). The Office of Special Education Programs of the U.S. Department of Education (OSEP) has said that districts may publish a list of names and addresses of evaluators that meet these criteria, including reasonable cost

or (2) request a due process hearing to dispute the need for an IEE and defend the propriety of its own evaluation. 34 C.F.R. § 300.502 (a)(2), (b) and (e)(1). The federal regulations further protect parents by providing that while a school district "may ask for the parent's reason why he or she objects to the public evaluation... [t]he explanation by the parent may not be required and the public agency may not unreasonably delay either providing the IEE at public expense or initiating a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4).

This provision allowing IEEs at public expense is one of the key protections afforded to parents under the IDEA. By providing parents with access to an independent educational expert at district expense, this provision "levels" what many parents argue is an otherwise "unlevel" playing field. In fact, the parents in this case have advanced the notion of an unlevel playing field as one of their primary arguments. The argument goes as follows: since school districts have more resources and qualified staff, parents are at an unfair advantage

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criteria, but the parent has the right to choose which of the evaluators on the list will conduct the IEE. In addition, according to OSEP, districts must allow parents to choose an evaluator who is not on the list but who meets the stated criteria. Parents are even allowed to choose an evaluator who does not satisfy the criteria if they can show unique circumstances that justify doing so. Letter from Patricia J. Guard, Office of Special Education Programs, to Alice D. Parker, Assistant Superintendent, California Department of Education (Feb. 20, 2004) *available at* http://www.ed.gov/policy/speced/guidideа/letter/2004 1/parker022004iee1q2004.doc

when a dispute arises—their only recourse is to hire an expert witness to refute the positions taken by school district personnel. Although some courts have accepted this line of reasoning,[3] it is fundamentally flawed because it is contrary to Congress's emphasis on the collaborative process. It ignores that an IEE is available at any point in the process, especially before there is any adversarial positioning in anticipation of litigation.

School districts are indeed responsible for hiring highly qualified teachers and related service providers (*e.g.*, school psychologists, school social workers, school nurses, occupational therapists, physical therapists, assistive technology personnel, etc.) who are certified and/or licensed by each state. But school districts do not employ such personnel to have an unfair advantage at due process hearings, as the adversarial paradigm might suggest. Rather, they employ such personnel to serve students appropriately. This Court has long recognized that state and local educational officials have the "primary responsibility" for public education. *See Rowley*, 458 U.S. at 230 n. 30. Whatever inherent

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[3] *See, e.g., Brillon v. Klein Indep. Sch. Dist.*, 274 F. Supp. 2d 864, 872 (D. Tex. 2003) ("Many school districts employ child and education experts on staff. If parents were unable to recover their expert fees, they might be unable to hire their own expert to effectively challenge the school district's position, thereby diminishing their ability to protect their rights to 'free appropriate public education ... designed to meet their unique needs.'").

advantages these employees may afford districts when a disagreement does arise with parents of children with disabilities, Congress has already considered them and counterbalanced them by providing parents not only full access to information concerning their child's education, but also the right to request that an independent evaluator weigh in on the issue in dispute, whether that issue pertains to eligibility, placement, services or any combination thereof, at school district expense. Presumably an independent evaluator has no incentive to favor either the district's or the parents' position and will conduct an objective assessment and will arrive at his or her own impartial conclusions and recommendations, in stark contrast to an expert witness hired from the outset to advance the position of one party in an adversarial approach.

Using an independent expert early in the process during the development of the IEP is more likely to lead to a collaborative result and avoid litigation, precisely as Congress intended. Giving parents the right to an independent evaluation at the IEP stage allows objective information to be shared, considered, and discussed by all of the IEP team members in determining appropriate educational services and placement for the child in a cooperative and thoughtful manner. In fact, the law requires that the results of the independent educational evaluation, as well as any other evaluations provided by the parents, be considered by the IEP team in determining a child's eligibility or educational needs. 20 U.S.C. § 1414(c)(1)(A). Whenever the district proposes or refuses to initiate

a change in a child's identification, evaluation, or educational placement or the provision of FAPE to a child, it must provide the parents with a notice that contains, among other information, an explanation for the district's action and a description of each evaluation procedure, assessment, record, or report the agency used in arriving at its decision; and a description of the other options considered by the IEP team and the reason for rejecting those options. 20 U.S.C. § 1415(c)(1).[4] Thus, a school district cannot capriciously or casually disregard the results of an independent educational evaluation. If the district disagrees with the results of the IEE, it must provide the parents with a full explanation for its disagreement.

Congress acted deliberately by explicitly providing for, and requiring districts to pay for, expert input at this early stage when it is of most value in ensuring that children receive the educational services they need as soon as possible, and not when the situation has devolved into the adversarial atmosphere of litigation where parents and their attorneys view it as advantageous to conceal the findings and recommendations of their hired experts until the last moment possible. The end result of the litigious stance is to delay appropriate services to children.

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[4] This information must also be provided whenever a parent files a due process complaint notice, if the district has not previously provided this information to the parent. 20 U.S.C. § 1415(c)(2)(B).

C. "Expert witnesses" hired by parents are by definition not independent and do not advance IDEA's collaborative intent

Expert witnesses by their very function and purpose do not play a collaborative role. In the case of disputes under the IDEA, parents retain an expert witness to advance the parent's position in the form of advocacy. Allowing parents to recoup the cost of expert witness fees will encourage parents to take a "no holds barred" approach to due process hearings and to be less inclined to resolve issues in a cooperative fashion during development of the IEP or through informal dispute mechanisms such as the resolution session, mediation or settlements (see more at pp. 16-17, *infra*). Authorizing such awards would give parents an additional opportunity to obtain expert input at public expense that Congress did not explicitly include in the statute. The availability of expert fees could in fact undermine the effectiveness of the mechanism Congress did provide—the right to IEEs—by encouraging expert shopping. If the results of an IEE do not support the parents' position or desired outcome for their child, the parents would have every incentive to find and hire yet another expert who will support their views and then to push the issue into formal proceedings in the hopes of recovering the expert's fees. When the payment of expert witness fees is at stake, both parties likely will become more firmly entrenched in their positions because the potential financial stakes become that much higher.

Such entrenchment not only undermines the cooperative process envisioned by the IDEA, it will promote litigation that significantly delays the resolution of the issues, and ultimately, the delivery of appropriate services to the child. IDEA has, since its inception, encouraged the resolution of educational disputes "as quickly as possible." *Powers v. Indiana Dep't of Educ.*, 61 F.3d 552, 556 n.3. (7th Cir. 1995). The IDEA favors the resolution of disputes in the most expeditious manner for the sake of the child's education, with full parental participation throughout, in a non-litigious manner. If this Court allows parents to recoup expert witness fees, the IDEA dispute resolution process will shift away from collaboration and toward extended adversarial proceedings, to the detriment of the child.

II. Recovery of Expert Witness Fees Will Lead to Increased Litigation Costs for Parents and Schools and Divert Attention and Resources from the Education of All Children

A. Authorizing the award of expert fees conflicts with congressional intent to reduce litigation costs under the IDEA

When the IDEA was reauthorized in 1997 and 2004, Congress clearly expressed its intent to promote collaboration between parents and school districts and to reduce litigation. 20 U.S.C. § 1400(c)(8) ("Parents and schools should be given

expanded opportunities to resolve their disagreements in positive and constructive ways."). As described above, the IDEA calls for parents' active and informed participation in every step of the development of a student's educational program. 20 U.S.C. § 1414(d). Should a disagreement arise during this process, the IDEA now includes an "opportunity to resolve" requirement. This provision, added in 2004, obliges the parents and the school district to participate in an informal resolution session prior to a due process hearing to provide parents an opportunity to discuss their concerns in an effort to promote early resolution of the issues in dispute. 20 U.S.C. § 1415(f)(1)(B). The IDEA also encourages federal- and state-mandated mediation prior to due process hearings. 20 U.S.C. § 1415(e). These provisions are clearly meant to obviate the need for formal administrative and judicial proceedings.

In addition, Congress has sought to encourage parents to engage in litigation responsibly and not to drive up legal costs to school districts unnecessarily. In 1997, Congress authorized reductions in attorneys' fees awards in certain circumstances, including when parents unreasonably protract the resolution of the dispute and prohibited the award of such fees when parents have rejected settlement offers that prove more favorable than the results obtained through litigation. 20 U.S.C. § 1415 (i)(3)(D), (F). In 2004, it amended the law to permit fee awards against parents and their attorneys for bringing frivolous complaints, thus creating a

disincentive for parents to bring unfounded claims. 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III).

Contrary to Congress's stated goal of reducing litigation costs through informal resolution of IDEA disputes, providing expert witness fee recovery will increase incentives for parents to litigate. Such incentives not only reduce the likelihood of mediated solutions or other cooperative outcomes, but necessarily increase the time and money spent on litigation. Specifically, school districts not only will be required to pay for parents' experts (in cases where parents prevail), but also school districts will be increasingly forced to hire their own experts to refute the positions taken by the parents' experts in due process hearings—even those in which parents do not prevail. Such additional expenses necessarily drain school district budgets and ultimately detract from the educational programs of all students. Clearly this was not the intent of Congress when it adopted the IDEA. *See* 20 U.S.C. § 1400(d)(1)(A)(stating that the purpose of the Act was to "ensure that all children with disabilities have available to them a free appropriate public education. . . ."). Nor is it consistent with Congress's repeated attempts in subsequent reauthorizations of the Act to encourage a collaborative rather than an adversarial approach.

B. Allowing recovery of expert fees will encourage claims for certain kinds of "expert" services for which fees are not traditionally recoverable, thereby engendering additional litigation to resolve fee disputes

Besides increasing litigation on the merits of parental challenges, authorizing the award of expert fees will burden courts with even more litigation involving fee disputes. Courts are already encountering claims under the IDEA for expert witness fees in connection with services not traditionally compensable under fee shifting provisions. One of the most common claims of this type is for the services of a lay advocate. Although arguably the line between an expert witness, educational consultant, and an advocate may sometimes be a fine one, it is clear that under the IDEA, parents are not entitled to reimbursement of fees charged by an advocate or the fees charged by an educational consultant that relate to advocacy. *E.g., L.L. v. Vineland Bd. of Educ.*, No. 04-2022, 128 Fed. Appx. 916, 2005 WL 943527 (3d Cir. June 20, 2005). In fact, the "expert witness" in this case wore dual hats of "educational consultant" and "advocate" and sought compensation for time spent serving in both capacities, despite previous court rulings against her that disallowed fees for time spent providing services similar to an attorney. *Arons v. New Jersey State Bd.*, 842 F.2d 58 (3d Cir. 1988); *Matter of Arons*, 756 A.2d 867 (Del. 2000), *cert.*

denied sub nom., Arons v. Office of Disciplinary Conduct of the Supreme Court of Delaware, 121 S. Ct. 2215 (2001).

If this Court affirms the Second Circuit's decision, the job of parsing out the fees related to each role (which would occur at the fee petition stage of the litigation) will require inordinate amounts of time for both parties, adding to the costs of litigation. Although the Third Circuit in *Arons* characterized this task as not "insurmountable," it is clear from the case law that already exists on this issue that a substantial amount of legal and judicial resources must be expended to resolve such issues. *E.g., A.H. v. South Orange Maplewood Bd. of Educ.*, No. 03-4103, 153 Fed. Appx. 863 (3d Cir. Nov. 7, 2005) (dismissing without prejudice an action filed by educational consultant seeking $1,190,700 in fees since such actions must be submitted by an attorney or by the parties personally and expressing no opinion as to the merits of any future fee claim); *Burgess v. Paterson Bd. of Educ.*, Civ. No. 04-2620, 2005 WL 220290 (D.N.J. Sep. 20, 2005) (reducing educational consultant's claim for fees for the hours she spent as an advocate for the parent, but allowing another consultant to recover all of the fees she claimed because no part of the hours she spent was "easily severable" from those spent on issues on which parents were unsuccessful); *Board of Educ. of Frederick County v. I.S.*, 358 F. Supp. 2d 462, 473 (D. Md. 2005) (finding, based on language in legislative history, that parents could recover cost of educational consultant who did not appear as an expert witness during the due process hearing

because consultant conducted an evaluation and provided parents a report that helped them decide to challenge their child's placement); *Noyes v. Grossmont Union High Sch. Dist.*, 331 F. Supp. 2d 1233, 1251 n. 7 (S.D. Calif. 2004) (finding that parents could recover fees for hours educational consultant spent consulting with their attorney during due process but not for time spent attending an IEP meeting because even attorneys' fees are not available for IEP meetings unless ordered by a hearing officer or court); *B.D. v. DeBuono,* 177 F. Supp. 2d 201, 208-09 (S.D.N.Y. 2001) (halving claim for over $209,000 in expert fees because claim was "exorbitant" given that school district's experts charged only $35,000); *Borough of Palmyra Bd. of Educ. v. R.C.*, No. 97-6119, 31 IDELR ¶ 3 (D.N.J. July 29, 1999) (finding in case brought under section 504 that parents could recover all fees paid to experts who testified at hearing and approximately half the fees paid to educational consultant but excluding consultant's time spent on providing therapy to the parents, attending a workshop on language disorders, inordinate amounts of travel, and rendering legal services); *Connors v. Mills,* 34 F. Supp. 2d 795, 808 (N.D.N.Y. 1998) (denying fee award to non-attorney advocate because claim did not differentiate between time spent on legal representation and that pertaining to consultation and advice, and finding that allowing award of fees for time spent on legal representation when no specific standards govern qualifications of lay advocates would inure to the benefit of those who are incompetent and unscrupulous).

The decisions on this issue also reveal that even where a court determines that reimbursement of expert fees is authorized by the IDEA, there remains significant confusion about how to resolve expert fee claims for various types of services. *Id.* This is amply demonstrated in the following excerpt from a recent decision by a U.S. District Court in New Jersey:

> [New Jersey] law precludes a lay advocate from receiving fees for "legal representation" of a party during a special education hearing. However, courts in this circuit have interpreted the IDEA's fee-shifting to authorize the award of reasonable expert fees to a prevailing party provided the expert work was essential to the preparation of the plaintiff's case. *See, e.g., id.* at 62; *P.G. v. Brick Twp. Bd. of Educ.*, 124 F. Supp. 2d 251, 267 (D.N.J. 2000). Therefore, even though a state regulation prohibits lay advocates from receiving fees for legal representation in IDEA due process proceedings, neither state nor federal law categorically bars those same individuals from receiving fees for work performed as an expert or consultant in preparation for such hearings.

C.H. v. Jefferson Twp. Bd. of Educ., 44 IDELR 249, 251 (D.N.J. 2005).

The *C.H.* case illustrates perfectly how awarding expert witness fees to prevailing parents will be fraught with dispute. The district court in *C.H.* held that the parents' advocate could simply present herself as the parents' expert or consultant to recoup fees. The parents' advocate billed the family $14,980.00 for her services, claiming 42.8 hours of work at an hourly rate of $350.00. The district court ultimately denied the parents' petition for fees without prejudice in order to allow them to submit proper documentation in support thereof (invoices, affidavits, etc.).

In the opinion of the *C.H.* court, an advocate simply needs to call herself an "educational consultant" or an "expert" to be entitled to fees if the parents prevail. Such rulings unfortunately serve to add an absurdly artificial form of litigious gamesmanship to a process that Congress intended to be collaborative and expeditious for the benefit of disabled children. *See Moubry v. Independent Sch. Dist. 696*, 9 F. Supp. 2d 1086, 1113 (D. Minn. 1998) ("While the IDEA has an inherent proclivity toward an adversarial approach, nevertheless, with the cooperative efforts of all concerned, the hallmark of the IDEA approach—namely, a collaborative process by parents and educators alike, so as to assure an instructional advancement greater than the sum of the individualized contributions—can be achieved toward the [student]'s best, and necessarily continuing, educational interests.").

C. Litigation expenditures divert valuable resources from special and general education

Public school systems support and advocate the provision of FAPE to students with disabilities. This Court has already recognized that the provision of special education programming and related services does not come cheap. *Schaffer*, 126 S. Ct. at 535 ("there is reason to believe that a great deal is already spent on the administration of the [IDEA]"). In fact, the United States Department of Education reports that public school systems spent approximately $78 billion educating special education students during the 1999-2000 school year alone. *See* U.S. DEP'T OF EDUC. TWENTY-FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES ACT at I-20 to I-23 (2002). Not only is this nearly 22% of elementary and secondary schools' total spending, it is double that spent on all other student populations. *Id.* These costs are borne primarily by state and local governments. While the federal government committed to funding 40% of the per pupil special education costs when it first enacted the predecessor statute to the IDEA in 1975, more than 30 years later, it still funds less than 20 percent of those costs, creating a cumulative funding gap of more than $59 billion for the last four fiscal years. NSBA, *Priority Issue: Federal Funding for Education* (Jan. 2006), *available at* www.nsba.org/site/docs/35100/35033.pdf

Costly litigation undermines the efforts of public schools to educate children with disabilities by siphoning already scarce resources from their budgets. In addition to educational costs, schools spend an average of $8,160 - $12,200 for each due process hearing[5] or mediation and nearly seven times that on litigation in federal court.[6] In school year 1999-2000 school districts spent approximately $146.5 million on special education mediation, due process proceedings, and litigation under the IDEA. *See* JAY G. CHAMBERS ET AL., CENTER FOR SPEC. EDUC. FINANCE, SPEC. EDUC. EXPENDITURE PROJ., WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION, 1999-2000 at 8 (May 2003). These costs will increase dramatically if school districts are forced to bear the cost of parent-retained experts.[7] Rather than furthering the

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[5] Other documentation suggests that these estimated costs are actually much higher. *See* David Gruber, *Communication and Conflict Resolution Skills Can Lead to Lasting Relationships for Children*, FOCUS ON RESULTS (Mich. Dep't Spec. Educ. & Early Intervention), *available at* http://www.cenmi.org/focus/dispute/article_05-02.asp (estimating the average cost of a due process hearing at around $25,000 to $40,000).

[6] This does not include the non-monetary cost to students, as their teachers are pulled from their classrooms to prepare for, and participate in, due process hearings, mediations, and other litigation. The average due process hearing lasts one to two weeks. *See* Perry A. Zirkel, *Transaction Costs and the IDEA*, EDUCATION WEEK, May 21, 2003 at 44.

[7] The Murphy's consultant in this case claimed approximately $30,000 in expert fees. Although the district court awarded less than $9,000 to the consultant, the school district has incurred additional legal fees to defend against her claim.

IDEA's goal of affording additional educational opportunities to special education students, reading a litigation cost into the statute for which Congress did not explicitly provide will only divert even more valuable resources from both special and general educational programs. As a result, "Congress has . . . repeatedly amended [IDEA] in order to reduce its administrative and litigation-related costs." *Schaffer*, 126 S. Ct. at 535.[8] To uphold the Second Circuit's ruling would constitute a departure from this congressional direction, as well as this Court's interpretation of the IDEA.

Experts in other cases cost even more. *See* John Madewell, *U.S. Court of Appeals Rules in Favor of Parents With Autistic Child*, News Channel 9 WTVC, *available at* http://www.news channel9.com/engine.pl?station=wtvc$id=880$template=pagesearch.shtml (last visited Feb. 17, 2006) (parents' expert witness cost $48,000; parents' doctor cost $18,000).

[8] *See* Zirkel, *supra*, n. 6 (discussing opposition of special education lawyers, publishers, and related cottage industries to "an expedited economical and expert system of dispute resolution [under the IDEA] that resolves rather than fosters 'adversariality' and maximizes the limited time and resources for services to students with disabilities").

CONCLUSION

For the foregoing reasons, *Amici* urge that the Second Circuit's opinion be reversed.

Respectfully submitted,

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